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CITATIONS

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM 1953

No. 222

CIVIL AERONAUTICS BOARD, PETITIONER

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, AND THE UNITED STATES OF AMERICA, ON BEHALF OF THE POSTMASTER GENERAL

No. 223

DELTA AIR LINES, INC., PETITIONER

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, AND THE UNITED STATES OF AMERICA, ON BEHALF OF THE POSTMASTER GENERAL

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE POSTMASTER GENERAL AND THE UNITED STATES OF AMERICA

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 68–76) is

reported in 207 F. 2d 207. The opinions of the Civil Aeronautics Board (R. 6–60) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1953 (R. 77). The petitions for writs of certiorari were filed on July 31, 1953, and were granted on October 12, 1953 (R. 79–80). The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

In 1948 the Civil Aeronautics Board fixed a prospective subsidy domestic mail pay rate for an air carrier conducting both domestic and foreign operations, which it estimated would yield the carrier a net return after taxes of 7.4% on that portion of its property allocable to domestic operations. Actual operations under that rate resulted in an average return on such property for the years 1948 through 1950 of 12.51%, or $654,000 more than a 7.4% rate of return would have produced. In 1951 the Board, in fixing the mail pay subsidy for those years for the carrier's international operations, refused to offset the $654,000. Section 406 (b) of the Civil Aeronautics Act directs the Board, in fixing mail pay subsidy, to "take into consideration * * * the need of each such air carrier for compensation * * * sufficient * * *, together with all other revenue of the air carrier, to enable such air carrier * * * to maintain and continue the development * * *" of a national air transportation system. The questions presented are:

1. Whether Section 406 (b) of the Act empowers the Board to award a subsidy in the form of "need" mail pay which exceeds the carrier's actual "need."

2. Whether Section 406 (b) authorizes the Board to award "need" mail pay subsidy on the basis of the needs of particular operating divisions of a carrier without regard to the need of the carrier as a whole.

3. Whether Section 406 (b) requires the Board, in determining a carrier's need for subsidy, to offset "*all* other revenue of the air carrier," or whether the Board may, in its discretion, offset only a part of such other revenue.

STATUTE INVOLVED

The Civil Aeronautics Act of 1938, 52 Stat. 977, as amended, 49 U. S. C. 401 *et seq.*, provides in pertinent part as follows:

> Section 1 (2) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in air transportation * * *. [49 U. S. C. 401 (2).]
>
> Section 1 (13) "Citizen of the United States" means (a) an individual who is a citizen of the United States or one of its possessions, or (b) a partnership of which each member is such an individual, or (c) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States * * *. [49 U. S. C. 401 (13).]

Section 401 (k) No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the [Board], unless * * * the [Board] shall find such abandonment to be in the public interest. * * * [49 U. S. C. 481 (k).]

Section 406 (a) The [Board] * * * is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, * * * to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, * * * and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft. [49 U. S. C. 486 (a).]

Section 406 (b) In fixing and determining fair and reasonable rates of compensation under this section, the [Board] * * *, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the [Board] * * * shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier

for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense. [49 U. S. C. 486 (b).]

Section 1001. The [Board] may conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice. * * * [49 U. S. C. 641.]

Section 1002 (d) Whenever * * * the [Board] shall be of the opinion that any individual or joint rate, fair, or charge * * * or the value of service thereunder, is or will be unjust and unreasonable * * *, the [Board] shall determine and prescribe the lawful rate, fare, or charge * * *. [49 U. S. C. 642 (d).]

STATEMENT

Petitioner Delta Air Lines is the successor by merger to Chicago and Southern Air Lines ("C & S"), a certificated air carrier which conducted both domestic and Latin-American operations prior to its absorption by petitioner. This case involves subsidy mail pay covering C & S's Latin-American division for the years 1948 through 1950.

In 1944 and 1945 C & S petitioned the Board to increase its domestic mail pay, and in July, 1948, the Board fixed the final domestic subsidy. *Chicago and*

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Southern Air Lines, Mail Rates, 9 C. A. B. 786. The Board fixed a prospective annual subsidy for the period beginning January 1, 1948,[1] which it estimated would yield C & S a net return after taxes of 7.4% on that part of its investment allocable to domestic operations.[2] *Id.*, at 812; R. 53. For the years 1948 through 1950, however, the carrier's actual profits under that subsidy resulted in an average return of 12.51% on domestic operations (R. 53, 65). This was $654,000 more than a 7.4% return would have produced (R. 70).

In October, 1946, C & S requested the Board to fix subsidy mail pay for its Latin-American routes (R. 8).[3] On October 18, 1951, the Board issued its opinion and order determining final subsidy mail pay for these foreign operations (R. 51).[4] Rates were fixed retroactively for the period November 1, 1946, to December 15, 1950, and prospectively from December 16, 1950 (R. 59). Subsidy was awarded

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[1] The subsidy which the Board fixed for the past period January 1, 1946, through December 31, 1947, is not involved in this case.

[2] The Board used a sliding scale rate formula under which the rate of return rose as the passenger load factor increased. The estimated return of 7.4% was based on the carrier's own estimated load factor of 60.09%. 9 C. A. B. 805, 812.

[3] C & S was certificated for its Latin-American routes in May 1946. *Latin American Air Service*, 6 C. A. B. 857, 927. Service was inaugurated over these routes November 1, 1946 (R. 8).

[4] In 1947 and 1948 the Board awarded temporary subsidy mail pay for the Latin-American operations. *Chicago and Southern Air Lines, Latin-American Mail Rates*, 7 C. A. B. 985; 9 C. A. B. 924.

in an amount designed to give the carrier a return after taxes of 7% for the past period (R. 23) and 10% for the future (R. 30) on its property allocable to foreign operations.[5]

In fixing foreign subsidy for the past period, the Board refused to offset the carrier's $654,000 "excess" earnings on its domestic operations against its "need" resulting from international flights (R. 53–54). In so doing, the Board reaffirmed and applied the principle it previously had enunciated in the contemporaneous *Western Air Lines* case [6]—that Section 406 (b) of the Civil Aeronautics Act does not require it to reduce a carrier's mail pay by any part of its other revenue "if there are sound reasons for not doing so as a matter of economic policy." The Board stated that if profits from domestic operations were used to "sustain" international flights, the "more robust" domestic segment of the industry would be burdened with the obligations of the "economically weaker" foreign part and subjected to an "unjustifiable strain"; that if the domestic segment were kept "financially sound," the public must ultimately benefit through lower fares, reduced mail compensation, more modern aircraft and im-

[5] The board awarded C & S total subsidy mail pay of $3,662,000 for its past foreign operations (R. 59). This was based on the carrier's adjusted break-even need of $3,122,000 (R. 19), a $393,000 return for the years involved (7%) on recognized international investment of $1,360,000 (R. 23), and a $147,000 allowance for Federal income taxes (R. 57).

[6] The validity of the Board's order fixing subsidy pay in that case is before this Court in Nos. 224 and 225, this Term, which have been consolidated for argument with these cases.

proved operating methods; and that it was "desirable" to maintain the "comparative status" between domestic operators with and those without foreign routes, in order to permit the Board to continue using the comparison technique for fixing class rates for domestic carriers (R. 54–55). The Board emphasized that its refusal to make the offset stemmed from "considerations of economic policy," and that it was not deciding whether it had the power to do so (R. 55; see R. 21).

On the Postmaster General's petition for review,[7] the Court of Appeals held that the Board had erred in refusing to offset C & S's excess domestic earnings. The court stated that the "plain meaning" of Section 406 (b) is that the need to be met in awarding subsidy is that of the "carrier as a whole," and not that of "divisible units conducting separate opera-

[7] At the time the petition for review was filed, the Postmaster General was required to pay air carriers for transporting air mail, out of funds appropriated by Congress for that purpose, at the rates fixed by the Board. Section 406 (a). He participated in all air mail pay proceedings before the Board, and served as the protector of the public interest in such proceedings. *Seaboard & Western Air Lines* v. *Civil Aeronautics Board*, 181 F. 2d 515, 518–519 (C. A. D. C.), certiorari denied, 339 U. S. 963. The Postmaster General thus had a substantial interest in the order under review within the meaning of Section 1006 of the Act. *Summerfield* v. *Civil Aeronautics Board*, 207 F. 2d 200, 203, Nos. 224 and 225, this Term; cf. *Far East Conference* v. *United States*, 342 U. S. 570, 576.

Pursuant to Reorganization Plan No. 10 of 1953, 18 Fed. Reg. 4543, subsidy payments for services rendered after October 1, 1953, will be made by the Board, and not by the Postmaster General. The latter will make only payments covering compensation for carrying the mail.

tions" (R. 71); that in determining C & S's "need" on its Latin-American routes, the Board was required to consider all of the carrier's other revenue (R. 71–72); and that, since the excess domestic profit of $654,000 admittedly was part of such revenue, the Board's refusal to " 'take' " the item " 'into consideration' " "results in allowing the carrier $654,000 more than its actual need, in disregard of the statutory requirement to keep subsidy allowances within those bounds" (R. 72).[8]

SUMMARY OF ARGUMENT

I

Section 406 (b) of the Civil Aeronautics Act provides that, in fixing fair and reasonable compensation for the transportation of mail by aircraft, the Civil Aeronautics Board "shall take into consideration," *inter alia*, the need of each air carrier for compensation sufficient (1) to insure the transportation of mail, and (2) to enable the carrier to maintain and continue the development of an efficient national air transportation system. In fixing mail pay, the Board recognizes this distinction. Economically

[8] Judge Prettyman, dissenting, stated that the Act authorizes the Board to fix different rates for international and domestic service (R. 75); that the Act contemplates that the Board, in fixing an international rate, will determine the amount needed by the carrier for its international operations (R. 76); and that, in determining "a separate rate for a separate type of mail service," the other revenue which the Board must consider "means revenue related to that service for which the rate is being fixed" (*ibid.*).

self-sufficient carriers are paid a "service" rate which constitutes fair compensation for carrying the mail, and supposedly contains no subsidy. Carriers not operating profitably, however, are paid a "need" rate which bears no relation to carrying the mail, but is an outright subsidy which guarantees them a return after taxes of at least 7 percent on their invested capital. The instant case deals solely with "need," *i. e.*, subsidy, mail pay.

Although this need is only one factor which the Act requires the Board to consider in awarding subsidy, it plainly is a limiting one, *i. e.*, the total subsidy cannot exceed the carrier's need. The Board cannot disregard the "carefully worded 'need' formula which the Act sets for the Board's guidance" in fixing subsidy mail pay, *American Airlines, Mail Rates*, 3 C. A. B. 323, 335, by determining and "considering" such need, and then awarding a subsidy in excess thereof.

The Board did not find that the carrier "needed" an additional $654,000 for its past international operations; it merely refused to offset this excess profit "as a matter of economic policy." In so doing, however, the Board awarded the carrier a subsidy in excess of its actual need. The developmental objectives of the Act do not authorize the Board to ignore the statutory limitation that total subsidy cannot exceed need.

II

As the Board consistently had recognized, the need to be met by subsidy is that of the carrier as a whole,

and not that of particular operating divisions. *E. g., Pan American Airways, Alaska Mail Rates*, 6 C. A. B. 61. The Board's authority to "fix different rates for different air carriers or classes of air carriers, and different classes of service" does not modify the limitation in the Act that subsidy cannot exceed "the need of * * * [the] air carrier [as a whole]," and does not authorize the Board to treat a carrier's international division as a separate carrier for subsidy purposes. If the carrier's international and domestic subsidies had been fixed in a single proceeding, plainly the need would have been that of the carrier as a whole. The amount of subsidy which a carrier needs, however, does not depend upon whether the Board fixes international and domestic mail pay in separate proceedings, or in a single one. Indeed, the Board's construction of the Act would permit it to award subsidy for unprofitable divisions of a domestic carrier even though the carrier's overall operation was profitable.

The Board's reliance on the traditional authority of rate making bodies to establish appropriate rate making units and to fix separate rates therefor overlooks the fact that in traditional rate proceedings the issue is whether the utility has received fair compensation, whereas in mail pay subsidy cases the issue is the carrier's need. The Board has power, as a procedural matter, to determine mail pay for international and domestic operations in separate proceedings. But by conducting such separate pro-

ceedings the Board cannot award total subsidy in excess of the need of the carrier as a whole.

III

1. Section 406 (b) of the Act defines a carrier's subsidy need as an amount which, "together with all other revenue of the air carrier," will enable the carrier to meet the statutory objectives. The Act thus requires the Board to offset *all* of a carrier's other revenue in awarding subsidy, and gives it no discretion to disregard any portion of such other revenue because of economic policy considerations. The term "all other revenue" does not mean "all or some part of other revenue." A carrier's need for subsidy is reduced to the extent that it has other revenue; allowing the Board to disregard any portion of such revenue would give the carrier a subsidy in excess of its need. The Board does not comply with the Act merely by "considering" such other revenue and then, having considered it, disregarding a part of it.

2. There is no issue here of "recapturing" any portion of the carrier's domestic earnings, or of revising its closed domestic rate. Obviously, a subsidy system does not take anything away from a carrier. The sole issue here is how much more subsidy the carrier is to receive for its international operations in addition to the substantial domestic subsidy it already has received for the same period.

Transcontinental & Western Air, Inc. v. *Civil Aeronautics Board*, 336 U. S. 601, is not in point.

The *TWA* case held only that the Board has no power under Section 406 (a) of the Act retroactively to revise a closed domestic *service* rate for the period prior to the filing of a petition to fix a new rate. This Court did not decide any of the broader issues as to subsidy under Section 406 (b) which the instant cases present, and to which different policy considerations are applicable.

3. Petitioners' economic arguments designed to show the allegedly harmful effects of compulsory offsetting upon the airline industry are all beside the point, since the Board has no discretion under the Civil Aeronautics Act to disregard any portion of a carrier's other revenue. In any event, they are unpersuasive. The claim that compulsory offsetting might lead domestic carriers to withdraw from international operations is wholly conjectural, and is based on assumptions that contravene normal economic behavior. The carriers have adequate incentives to operate efficiently, and their financial stability would not be threatened by offsetting domestic subsidy earnings in excess of their needs.

ARGUMENT

INTRODUCTION

At the outset, we think it important to place these cases in their proper perspective. Although petitioners treat them as involving traditional rate-making, the fact is that, in any realistic sense, these are not rate proceedings at all. Rate making involves the fixing of the maximum amounts which

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a public utility in a noncompetitive business can charge its customers for services, and is designed to protect the consuming public against overcharges which might otherwise result, while at the same time insuring the utility a fair rate of return. The so-called rate making by the Board in this case, however, is nothing more or less than the awarding of subsidies which Congress has determined the airlines should receive from the public treasury [9] in order to permit the development of an efficient national air transportation system. Although Congress has provided that the amount of such subsidies is to be determined through the mechanism of fixing

[9] The Board has estimated that $270,000,000 of the $457,000,000 total mail pay which domestic carriers received during the fiscal years 1938 (when the Act was passed) through 1951, or almost 60%, represented subsidy. Civil Aeronautics Board, *Administrative Separation of Subsidy from Total Mail Payments to Domestic Air Carriers*, September 1951, p. 5. During the same period, mail payments to international carriers—whose percentage of subsidy, although not specified, was "substantially greater" than that of domestic carriers—totalled $330,194,000. Civil Aeronautics Board, *Administrative Separation of Subsidy from Total Mail Payments to United States International Overseas and Territorial Air Carriers*, June 1952, p. 3, Appendix D. For the fiscal years 1952 through 1955, the Board has estimated that all American carriers, both domestic and international, will receive total mail pay of $527,195,000, of which $307,174,000, or approximately 58%, will represent subsidy. Civil Aeronautics Board, *Administrative Separation of Subsidy from Total Mail Payments to United States Air Carriers*, September 1953 Revision, p. 1. Thus, total subsidy payments to American air carriers during the first 18 years of the Civil Aeronautics Act are expected to exceed three quarters of a billion dollars.

fair and reasonable mail pay rates—a concept apparently borrowed from traditional rate-making statutes—" '[r]ate' as applied to the Government's air-mail payments is an euphemism to embrace a subsidy as well as compensation." Mr. Justice Jackson, dissenting, in *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U. S. 601, 608. It is fundamental to a proper understanding of the issue in these cases that it be made clear that the "rates" involved are subsidy payments, and bear no relation to just compensation for carrying the mail.

Two other points are significant. First, contrary to petitioners' contention, there is no real issue in this case as to "recapture" of any portion of C & S's earnings. Obviously, a subsidy system is not one which takes away anything. The sole question here is how much subsidy C & S is to receive for its international operations for the years 1948 through 1950 *in addition to* the very substantial subsidy which it already has received for domestic operations during the same period.[10] Second, this case relates only to the treatment of *excess* domestic profits—*i. e.*, those in excess of 7.4%—which have accrued under prior subsidy payments. The fact is that the carrier here is complaining because its subsidy from the public

[10] C & S reported that it received total domestic mail pay of $5,439,692 during those years. Application of the 53 cents per ton mile service rate which the Board applied to C & S in its Administrative Separation would indicate that approximately $4,500,000 of this amount, or 83%, represented subsidy. The supporting data for these calculations are set forth in the Appendix, *infra*, p. 47.

treasury is limited to an amount which gives it an overall return after taxes of 7.4% on its invested capital (Pet. Board's Br., p. 6, n. 2).

1.

SUBSIDIES IN THE FORM OF MAIL PAY CANNOT EXCEED THE "NEED" OF THE CARRIER

Section 406 (a) of the Civil Aeronautics Act (*supra*, p. 4) directs the Civil Aeronautics Board to fix "fair and reasonable" rates of compensation for the transportation of mail by aircraft. Section 406 (b) (*supra*, pp. 4–5) provides that, in determining such rates, the Board "shall take into consideration," *inter alia*,

> * * * the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, *together with all other revenue of the air carrier*, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense. [Emphasis added.]

The Act thus distinguishes between a carrier's respective need for compensation sufficient (1) to insure the transportation of mail, and (2) to enable the carrier to promote the development of an efficient national air transportation system.

The Board has recognized this distinction in fixing mail pay. Mail payments are calculated either on what the Board describes as a "service" basis, or on what it calls a "need" basis. If the carrier is economi-

cally self-sufficient, it is paid a so-called "service rate," which is designed to give it fair compensation for carrying the mail, and supposedly contains no subsidy elements.[11] This rate is based on the number of mail miles flown, either actually or prospectively. Illustrative of such rates is the 45 cents per ton mile currently being paid to the "big four" domestic airlines (American, Eastern, T. W. A., and United).

If, however, the carrier is not economically self-sufficient, its mail pay then is determined on a "need rate." This is an acknowledged subsidy in an amount designed to maintain the carrier as an efficient going concern, and has no relation to its mail carrying services.[12] "Need" pay is fixed by the Board in an amount sufficient (1) to enable the carrier to meet its operating expenses, (2) to pay its taxes, and (3) to provide a fair rate of return on its

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[11] *Eastern Air Lines, Mail Rates*, 3 C. A. B. 733, 755, 760 (1942); Burt and Highsaw, *Regulation of Rates in Air Transportation*, 7 La. L. Rev. 1, 378, 387. "Service rate" payments, however, are not limited merely to reimbursement of the carrier's expenses of carrying the mail, but also include a fair profit on the investment allocable to the service. *Eastern Air Lines, supra*, at 755–756.

[12] Indeed, the Board has allocated "need" payments to particular routes on which no mail was carried. *Chicago and Southern Air Lines, Mail Rates*, 3 C. A. B. 161, 190 (1941); *Pennsylvania-Central Airlines, Mail Rates*, 4 C. A. B. 22, 28 (1942).

invested capital.[13] However, since the Act requires the carrier to operate under "honest, economical, and efficient management," the Board reduces the amount of subsidy need by disallowing excessive or improper expenditures or operations which fail to meet that criterion.[14]

The instant case illustrates how such a "need rate" is calculated. The Board first determined that C & S needed $3,122,000 to break even on its international division (R. 19). In making this calculation, the Board disallowed certain expenditures which were not consistent with "honest, economical, and efficient management." Thus, the Board disallowed expenses incurred on flights which it found had not been justified by the volume of traffic (R. 11–13, 16), and made adjustments to reflect the carrier's exces-

[13] *Pioneer Air Lines, Mail Rates*, 8 C. A. B. 175, 187 (1947). The Board generally allows a 7% return for past periods on both domestic and international operations (*Western Air Lines, Mail Rates*, Docket No. 2870, Order E–4870, November 24, 1950, mimeographed p. 47; R. 23, 56), although special circumstances sometimes have resulted in other rates. *E. g., Capital Airlines, Mail Rates*, 10 C. A. B. 705, 725 (1949) (only 6% return because of carrier's "top-heavy" debt structure). For future periods, the return generally allowed is 8% for domestic operations (*Chicago and Southern Air Lines, Domestic Operations, Mail Rates*, Docket No. 5144, Order E–5869, November 15, 1951; *Pioneer Air Lines, Mail Rates*, 12 C. A. B. 84) and 10% for foreign operations (R. 30).

[14] For example: failure to reduce schedules following drop in traffic (*Capital Airlines, Mail Rates*, 10 C. A. B. 705, 708–712); excessive salaries (*Pioneer Air Lines, Mail Rates*, 8 C. A. B. 175, 185; *Trans-Texas Airways, Mail Rates*, 12 C. A. B. 101, 110); unnecessarily high maintenance charges (*Northeast Airlines, Mail Rates*, 9 C. A. B. 291, 296–304).

sive depreciation charges (R. 17).[15] The Board next determined that the carrier's recognized investment for subsidy purposes—again after making certain adjustments (R. 22–23)—was $1,360,000, on which it allowed a 7% return, or $393,000 for the years involved (R. 23). To this was added a $147,000 allowance for Federal income taxes (R. 57), giving total subsidy mail pay for the period of $3,662,000 (R. 59).[16] It should be noted that none of these calculations was based upon or even considered the amount of mail which C & S carried.

The so-called "need rate" is thus nothing more or less than the "statutory device"[17] whereby the Government, for reasons of national policy, gives the air carriers an outright subsidy which guarantees them at least a 7% return after taxes on their recognized invested capital.

As the Board itself has recognized, "Section 406 (b) of the Act * * * requires that mail pay shall be awarded *in an amount corresponding to the statutory 'need' for such compensation* as a means of maintaining and continuing the development of air

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[15] The Board's refusal to offset the excess domestic earnings occurred in calculating this break-even need.

[16] Application of the 88 cents per ton service rate which the Board used in its Administrative Separation for C & S's international division to the 54,000 U. S. mail ton miles actually flown on this operation from November 1, 1946, to December 15, 1950 (R. 35), would indicate that only $47,000 of the total mail pay awarded was compensatory, and the balance of $3,615,000, or more than 98%, constituted subsidy.

[17] *American Airlines, Mail Rates*, 3 C. A. B. 323, 335.

transportation in the public interest * * *."[18] Although need is not the only factor which the Board must consider, it plainly is a limiting one, *i. e.*, the Board cannot award subsidy in excess of what the carrier needs. The statutory mandate that the Board "shall take into consideration" the carrier's need [19] cannot be construed to authorize the Board to disregard the need limitation in awarding subsidy. At most, it authorizes the Board to determine that a carrier's financial condition is such that it has no need for subsidy—as the Board does whenever it fixes mail pay on a service rate. Cf. *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U. S. 604, discussed *infra*, pp. 35–36. The "carefully worded 'need' formula which the Act sets for the Board's guidance in fixing the air mail 'compensation'", *American Airlines, Mail Rates*, 3 C. A. B. 323, 335, cannot be read to permit the Board to disregard this standard by determining and "considering" such need and then awarding a subsidy in excess thereof. When Congress directed the Board to "take into consideration" the carrier's need, it

[18] *Western Air Lines, Mail Rates*, Docket No. 5148, Order No. E–6295, April 7, 1952, at mimeographed p. 11, emphasis added. Accord: *American Airlines, Mail Rates*, 3 C. A. B. 323, 335–338 (1942); *Pan American Airways, Alaska Mail Rates*, 6 C. A. B. 61, 67 (1944); *Pan American Airways, Latin-American Mail Rates*, 6 C. A. B. 85, 91 (1944); *Pan American Airways, Trans-Pacific Mail Rates*, Docket No. 2147, Order No. E–5882 (November 21, 1951, mimeographed p. 21).

[19] We discuss *infra*, p. 35, petitioners' contention that the words "take into consideration" modify the words "all other revenue of the air carrier."

plainly intended such need to be a ceiling on subsidy payments.

In the instant case, the Board did not find that the carrier "needed" an additional $654,000 for its past international operations. It merely concluded that those excess domestic profits should not be offset "as a matter of economic policy" (R. 54).[20] In so doing, however, the Board gave the carrier a subsidy which clearly exceeds its actual need. Thus, in 1948 the Board found that C & S "needed" subsidy which would produce a 7.4% return on its property allocable to domestic operations. Total subsidy payments, however, resulted in profits of $654,000 more than a 7.4% return. In other words, it now appears that the Board gave the carrier total domestic subsidy which was $654,000 more than the carrier actually needed during those years, or an overall return of 11% (Board Br. 6 n. 2).[21] In such circumstances, the carrier (which, after all, is but one

[20] Contrary to the suggestion in the Board's brief (p. 41), this conclusion cannot be deemed equivalent to a finding that C & S needed that much additional subsidy. The Board did not grant the additional subsidy on that theory, nor, for the reasons stated in the text, could it have done so. Moreover, the issue is not whether the Board made a formal finding to that effect, but whether the Board awarded subsidy in excess of the carrier's need. Similarly, there is no merit to the argument (Br. 41–42) that the Section 406 (a) statutory finding that the rate is "fair and reasonable" is sufficient. Under the Act, a rate cannot be found fair and reasonable if the Board has departed from the standards of Section 406 (b) in fixing it.

[21] But for this subsidy, C & S would have had no excess earnings during those years. See *supra*, p. 15, n. 10.

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economic unit) cannot complain if such excess domestic subsidy is applied to reduce any alleged need for subsidy on its international operations during those same years. Indeed, as we demonstrate in Point III, *infra*, the Act requires the Board to offset *all* of this other revenue of the carrier in determining the carrier's total subsidy need.

We are not, as the Board alleges (Br. 39–40), seeking to limit subsidy to the minimum amount required to maintain operations of an air carrier system at their existing level. On the contrary, we fully recognize that the developmental objectives of the Act are one of the factors upon which need is to be calculated. Indeed, the Board gives effect to these objectives by awarding subsidy sufficient to guarantee the carrier a substantial profit, instead of merely covering operating expenses. The different rates of profit allowed for domestic and international operations (*supra*, p. 18, n. 13) similarly reflect the developmental need for a higher return in the more uncertain international field to attract investment capital. But there is no warrant for any assumption that the developmental objectives of the Act authorize the Board to ignore the statutory limitation that total subsidy cannot exceed the carrier's need.

II.

THE "NEED" REFERRED TO IN SECTION 406 (B) IS THE NEED OF THE CARRIER AS A WHOLE, AND THE ACT DOES NOT AUTHORIZE THE BOARD TO AWARD SUBSIDY ON THE BASIS OF THE "NEED" OF PARTICULAR OPERATING DIVISIONS

The Board in the instant case, while recognizing the need standard as the basis for awarding subsidy,

nevertheless concluded that "the earnings from C & S's domestic routes should not be used to offset the 'need' resulting from the carrier's international routes" (R. 55). In thus looking to the need of a single operating division rather than to that of the carrier as a whole as the basis for awarding subsidy, the Board departed from the "plain meaning" of the Act that the need to be met by subsidy pay is that of "a carrier as a single entity," and not that of "divisible units [of the carrier] conducting separate operations" (R. 71).

A. *The language of the Act establishes the need of the carrier as a whole as the basis for awarding subsidy*

Section 406 (b) clearly specifies that the need to be met in fixing subsidy is that of the carrier as a whole, and not that of particular operating divisions. The "need" clause begins by defining need as that of "each such air carrier." [22] The "other revenue" clause [23] similarly speaks of all other revenue "of the air carrier," and then refers to compensation which, together with such other revenue, is sufficient to enable "such air carrier" to carry out the statutory objectives. The Act thus establishes the air carrier itself—and not particular divisions or routes thereof—as the "primary unit around which the national air transportation system was to be developed through the instrumentality of air mail [subsidy] compensa-

[22] That clause is: "* * * the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service * * *"

[23] That clause is "* * * together with all other revenue of the air carrier * * *"

tion." *Chicago and Southern Air Lines, Mail Rates*, 3 C. A. B. 161, 190.

Until the decision in the instant case (and in the contemporaneous *Western Air Lines* case), the Board consistently had recognized this principle. In the *Chicago and Southern* case, *supra*, the Board, in deciding that it could award subsidy mail pay to cover routes on which no mail at all was carried, flatly held:

> The "need" [referred to in Section 406 (b)] is that of the air carrier as a whole and not that of any particular geographical division of its operations [*Ibid.*].

This view was specifically reasserted in a number of subsequent cases involving subsidy mail pay for both domestic and international operations. *Delta Air Corporation, Mail Rates*, 3 C. A. B. 261, 271 (1942) (domestic); *Pan American Airways, Latin-American Mail Rates*, 3 C. A. B. 657, 670 (1942) (international); *Eastern Air Lines, Mail Rates*, 3 C. A. B. 733, 739–740 (1942) (domestic); *Pennsylvania-Central Airlines, Mail Rates*, 4 C. A. B. 22, 28 (1942) (domestic); *Western Air Lines, Mail Rates*, 4 C. A. B. 441, 444 (1943) (domestic); cf. *American Airlines, Mail Rates*, 3 C. A B. 323, 339 (1942); *Transcontinental & Western Air, Mail Rates*, 4 C. A. B. 139, 143 (1943). And see cases cited *infra*, p. 25, n. 24.

In the *Pan American* case in 1944, the Board reaffirmed this principle in refusing to award additional subsidy for one division because of a carrier's "excess" earnings on another division. *Pan American Airways, Alaska Mail Rates*, 6 C. A. B. 61, 67.

Pan American's operations were conducted through four separate divisions. In fixing subsidy mail pay for the carrier's Alaskan division, the Board first determined the need of that division as a separate entity, and then "considered our findings with respect to respondent's other operating divisions, thereby *taking into consideration the 'need' of the respondent as a whole.*" *Id.* at 65 [emphasis added]. The Board refused to award any additional subsidy to cover the $1,533,614 which it found the carrier needed on its Alaskan division, because the carrier's "excessive earnings" of $6,097,751 from its Latin-American operations were "ample" to satisfy this "need". *Id.* at 67.

The Board stated that—

> [s]ince the amount of respondent's excess earnings greatly exceeded the requirements of the Alaska division, respondent has no "need" for which it may be paid additional compensation [*ibid.*].[24]

In attempting to distinguish its prior decisions, the Board states (Br. 35) that it consistently has refused

[24] Similarly, the Board refused to award additional subsidy to meet the carrier's "need" of $1,607,501 on its Pacific division because of the excess earnings on the Latin-American division. *Pan American Airways, Alaska Mail Rates*, 6 C. A. B. 61, 78. The Board again reaffirmed the view that the need to be met is that of the carrier as a whole, and not that of particular operating divisions, in fixing Pan American's subsidy pay for 1945. *Pan American Airways, Alaska Mail Rates*, 8 C. A. B. 244, 257 (1947); *Pan American Airways, Transatlantic Mail Rates*, 8 C. A. B. 267, 288–289 (1947); *Pan American Airways, Latin-American and Miami-Leopoldville Mail Rates*, 8 C. A. B. 876, 882 (1947).

to offset profits or make up losses from final division rates. This contention, however, relates to the Board's statutory duty to offset *all* of the carrier's other revenue in determining need (see discussion Point III, *infra*, pp. 30–47). It does not contravene the fact that, prior to the instant case, the Board always had viewed the need to be met in awarding subsidy as that of the carrier as a whole.

B. *The Act does not authorize the Board to treat C & S's international division as a separate carrier for mail pay purposes*

Petitioners argue, however, that the first sentence of Section 406 (b) authorizes the Board to treat C & S's international division as a separate air carrier in determining subsidy need. That sentence provides that in fixing mail pay the Board "may fix different rates for different air carriers or classes of air carriers, and different classes of service." While that provision authorizes the Board to allow different rates of return for the carrier's two divisions, it does not modify the limitation in the second sentence of Section 406 (b) that subsidy is to be awarded to meet "the need of * * * [the] air carrier [as a whole]." Indeed, as Section 1 of the Act makes clear, "air carrier" means the corporate entity, not particular subdivisions thereof. For Section 1 (2) defines "air carrier" as "any citizen of the United States who undertakes * * * to engage in air transportation * * *," and Section 1 (13) in turn limits "citizen of the United States" to (a) an individual, (b) a partnership, or (c) a corporation or association.

As we have noted, it is the second sentence of Section 406 (b) which sets forth the substantive criteria to be applied by the Board in fixing subsidy, including the over-all limitation to the need of the carrier as a whole, and the method of calculating such need. The first sentence of 406 (b) does not alter these standards, but merely makes it clear that, in determining such need, the Board is not required to fix the same rate for all carriers, but has discretion to fix different rates for different carriers or classes of service, as the "conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers" may require. Thus the Board is authorized to—and does—fix different rates for international and domestic carriers,[25] and for various classes of carriers within each of these categories.[26] But in thus fixing rates separately, the Board cannot ignore the requirement in the second sentence of 406 (b) that total *subsidy* cannot exceed the need of the *carrier as a whole*. A particular division does not become a separate "air carrier" for subsidy purposes merely because the Board, as a procedural matter,

[25] The Board fixes subsidy for international carriers on a basis designed to provide a higher rate of return than for domestic carriers—apparently reflecting the greater uncertainties in international operations and the correspondingly higher return necessary to attract investment capital. See *supra*, p. 18, n. 13.

[26] In its Administrative Separation the Board has divided domestic carriers into seven categories, whose service rates range from $0.45 per ton mile for the "big four" to $7.26 per ton mile for the smallest carriers. International carriers similarly have been grouped into six categories with varying service rates.

elects to fix its subsidy in a separate administrative proceeding.

If the Board had fixed C & S's subsidy on its domestic and international operations simultaneously in a single proceeding, there could be no doubt that the air carrier whose subsidy need was to be met would be the carrier as a whole, and that in ascertaining such need the Board would look to the carrier's total revenues. The amount of subsidy which a carrier needs, however, does not depend upon whether the Board fixes mail pay separately for domestic and international operations, or jointly in a single proceeding. The "need of * * * [the] air carrier" is the same in either case.

Indeed, the Board's construction of the Act would allow it to go even further, and to award subsidy separately to particular divisions of a domestic carrier without regard to that carrier's over-all financial position. Thus, a domestic carrier with three operating divisions, two of which were extremely profitable but one of which was not, could call upon the Board to make up losses on the latter division even though its over-all operation was successful. Under the Board's theory, all that would be required to justify such a bounty would be a reasonable basis for employing a separate proceeding for fixing subsidy for the unprofitable division.

There is no inconsistency in permitting the Board to conduct separate administrative proceedings to fix a carrier's domestic and international subsidy,

and at the same time limiting the total subsidy awarded in both proceedings to the need of the carrier as a whole. Cf. *B. & O. R. Co.* v. *United States*, 345 U. S. 146. That was precisely what was done in the *Pan American* cases (discussed *supra*, pp. 24–25), where the Board determined separately the subsidy need of one operating division of a carrier, but refused to award additional subsidy to meet that need because of the carrier's excess earnings on another division. Indeed, if Pan American's four unconnected divisions are not separate carriers for subsidy purposes—as the Board repeatedly has held—C & S's two interconnected divisions have even less claim to be so treated.

We do not challenge the Board's power, as a procedural matter, to determine mail pay for international and domestic operations in separate proceedings.[27] Our point is that this practice cannot be used to circumvent the statutory limitation that total subsidy cannot exceed the need of the carrier as a whole.

The Board's contention (Br. 38) that the decision below denies it the traditional authority of rate-making bodies to establish separate rate-making units and to set rates at a level which will sustain the particular unit confuses the issues in rate making with

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[27] The Board's power to do so does not necessarily depend upon the first sentence of Section 406 (b). Section 1001 authorizes the Board to "conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice."

those in the awarding of subsidy.[28] In traditional rate proceedings, the issue is whether the maximum charges to customers which the regulatory agency has fixed for a public utility meet the constitutional standards of due process and just compensation. Cf. *B. & O. R. Co.* v. *United States, supra.* In the case at bar, however, there is no such issue, since by definition the carrier is receiving a subsidy which bears no relation to the mail transportation services performed for the Government. The cases dealing with a rate-making agency's discretion to select an appropriate rate-making unit are relevant only to show that the Board can fix rates separately for domestic and foreign operations—a power which we do not dispute. They afford no support for the Board's asserted power to ignore excess subsidy profits from one division in awarding subsidy on another division.

III.

SECTION 406 (B) REQUIRES THE BOARD, IN DETERMINING A CARRIER'S SUBSIDY NEED, TO OFFSET ALL—NOT JUST SOME—OTHER REVENUE OF THE CARRIER

The Board's refusal to offset C & S's $654,000 excess profits [29] on its domestic routes was made in

[28] The Board itself has recognized that its function in fixing mail pay differs "fundamentally from that which faces the public regulatory body in the fixing of rates for the transportation of passengers and property or in fixing the rates for public utility services." *Pan American Airways Co., Transatlantic Mail Rates*, 1 C. A. A. 220, 252–253.

[29] Petitioner Delta argues (Br. 49–52) that these profits were not "excess" because the Board recognized in fixing subsidy in 1948 that C & S's earnings might, if the carrier enjoyed a higher load factor than anticipated, exceed a 7.4 per cent return. The characterization of the $654,000 as

the course of calculating the carrier's break-even point (R. 19). In refusing to make the offset—thereby giving the carrier $654,000 extra subsidy—the Board did not hold that C & S "needed" that additional amount on its international operations. It merely concluded that such excess profits—admittedly "other revenue" (R. 54)—"should not be used to offset the 'need' resulting from the carrier's international routes" (R. 55). This conclusion was grounded upon the Board's view that, although it is required under Section 406 (b) to take all of a carrier's other revenue into consideration in determining the need for subsidy mail pay, it nevertheless may, in its discretion, refrain from "reduc[ing] the carrier's mail pay with any part of such other revenue if there are sound reasons for not doing so as a matter

"excess," however, was made initially by the Board itself, in both its tentative findings (R. 21) and in its final opinion (R. 53). The earnings are deemed "excess", not in any sense that C & S is not entitled to them, but only in that they exceed the amount which the Board in 1948 found was necessary to satisfy the carrier's need.

In two recent tentative decisions the Board has stated that it used the term "excess" earnings in the instant case to refer "only to earnings in excess of a stated rate of return on investment," and did not determine "how much, if any, of these 'excess' earnings should be considered as excessive in the sense that these earnings are available for or should be offset against the mail rate for the international division * * *. A determination that earnings are excessive in the latter sense obviously requires more than a mere subtraction of actual or estimated profits from an estimated rate of return on investment." *Delta Air Lines, Mail Rates*, Order E–7738, n. 10, mimeographed p. 6 (Sept. 21, 1953); *Braniff Final Mail Rate Case*, Order E–7815, n. 9, mimeographed p. 7 (October 13, 1953).

of economic policy" (R. 54). In thus reading into the Act a discretionary power to disregard a portion of a carrier's other revenue because of economic policy considerations, the Board is departing from the clear intent of Congress that in awarding subsidy it must offset *all*—not just some—of such revenue. In short, the Board is writing into the Act its own notions of economic policy, where Congress left no room for such discretion.

1. The intent of Congress reflected in Section 406 (b) is that an air carrier is to receive only such subsidy mail pay as it "needs" (see Point I, *supra*, pp. 16-22), and that, in determining such "need," the Board is to offset all—not just a part—of the carrier's other revenue. The Act defines the carrier's need for subsidy as an amount which, "together with *all other revenue* of the air carrier" [emphasis added] is sufficient to enable the carrier to meet the statutory objectives. In other words, the Board is directed to award subsidy in an amount which, when added to all the carrier's other, *i. e.*, nonmail pay, revenue, will provide it with funds sufficient to carry out the national air transportation policy. Cf. *Pan American Airways* v. *Civil Aeronautics Board*, 171 F. 2d 139, 140 (C. A. D. C.).[30] The Board gives effect to this

[30] The court there stated: "It has developed in some cases that the carrier had no need for mail pay in addition to reasonable compensation for services rendered; but in other cases there was such need, because *all the other revenue* was not sufficient to enable the carrier to meet the objectives of the statute" [emphasis added]. And see *Seaboard & Western Air Lines* v. *Civil Aeronautics Board*, 181 F. 2d 515, 519 (C. A. D. C.), certiorari denied, 339 U. S. 963.

limitation through the procedure of offsetting such other revenue against the carrier's total break-even requirements (*e. g.*, R. 9–19).[31]

The reason Congress required the Board to offset *all* of a carrier's other revenue in determining subsidy need is clear. Airline subsidies obviously are intended to make up any deficit between the carrier's nonmail pay revenues and the total amount which the carrier needs to enable it to "maintain and continue the development of air transportation." Such deficit is the measure of the carrier's "need" for subsidy. To whatever extent the carrier has other revenue, the deficit and, consequently, the need for subsidy, are correspondingly reduced.

If however, the Board can ignore portions of such other revenue—for whatever reason—the inevitable result would be to give the carrier a subsidy in excess of its actual need. It was presumably to avoid just that result that Congress required the Board to offset "all other revenue of the air carrier." The term "all other revenue" is clear; it does not mean "all or some part of other revenue." Had Congress intended to allow the Board to disregard any portion of such other revenue, it would have said so in plain terms, and not used the unequivocal "*all* other revenue." [Emphasis added.] The practical effect

[31] The fact, referred to by Judge Prettyman in his dissenting opinion below (R. 76), that the Act does not refer to offsets and deductions, is immaterial. The significant fact is that the Act shows on its face that subsidy need is to be determined in relation to *all* other revenue.

of the Board's construction would be to read the "all other revenue" clause out of the Act.

Indeed, where Congress intended to give the administrative agency discretion to award subsidy without regard to specific statutory limitations—as the Board here in effect is claiming—it did so in clear language. Thus, Section 2 (e) of the Emergency Price Control Act of 1942, 56 Stat. 24, 50 U. S. C. Appendix 902 (e), authorized the Administrator of Price Control, whenever he determined that the maximum necessary production of any commodity was not being obtained, "to make subsidy payments to domestic producers of such commodity *in such amounts* and in such manner and upon such terms and conditions *as he determines to be necessary to obtain the maximum necessary production thereof* * * *" [emphasis added].

The Board plainly is given no such discretionary authority by Section 406 (b), which limits total subsidy to "the need of each such air carrier for compensation * * * sufficient * * * together with all other revenue of the air carrier * * *" to meet the statutory objectives. A statute providing for Government subsidy of private enterprise is, as this Court repeatedly has pointed out,[32] to be strictly construed—so as to give effect to the limits pre-

[32] *Slidell* v. *Grandjean*, 111 U. S. 412, 437; *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 49; *District of Columbia* v. *Johnson*, 165 U. S. 330, 338; *Northern Pacific Railway Company* v. *Soderberg*, 188 U. S. 526, 534; *Northern Pacific Railway Co.* v. *United States*, 330 U. S. 248, 257.

scribed by Congress in an endeavor to safeguard against unwarranted payment of public funds.

Nor is there any merit to petitioners' argument (Board's Br. 40–41, Delta's Br. 53–58) that the Act merely requires the Board to "consider" such other revenue, and that once the Board has done so, it then may, in its discretion, offset such other revenue in whole, in part, or, indeed, not at all. In the first place (as petitioner Delta admits, Br. p. 20, n. 12), as a matter of syntax the words "take into consideration" modify "need," not "all other revenue." And, as we have noted (*supra*, pp. 20, 32–34), they do not authorize the Board to award subsidy in excess of such "need" by "considering" and then disregarding it. But even if the words "take into consideration" were deemed to modify the words "all other revenue," this would not aid petitioners. For, as we have shown, Congress intended in Section 406 (b) to limit subsidy to the carrier's actual need, defined as an amount which, together with all the carrier's other revenue, will enable the carrier to meet the statutory objectives. This purpose would be defeated if the Board could "consider" such other revenue and then, having "considered" it, could offset it or not as it saw fit. If "take into consideration" does refer to other revenue, Congress plainly meant the Board to "consider" all other revenue in the sense of offsetting it.

Neither *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U. S. 604, nor *New York* v. *United States*, 331 U. S. 284, upon which petitioners rely, supports their contention that the Board in its dis-

cretion can refuse to offset any part of other revenue. In the *Roig* case, the Court upheld an order of the Secretary under the Sugar Act of 1948, 61 Stat. 922, 7 U. S. C. (Supp. V) 1100 *et seq.*, which allotted the Puerto Rican sugar quota among sugar marketers. Section 205 (a) of the Act provided that such allotments were to be made "by taking into consideration" three factors: (1) "processings of sugar * * * to which proportionate shares * * * pertained"; (2) past marketings; and (3) ability to market the amount requested. In making the allotments, the Secretary gave equal weight to the second and third of these factors, but concluded that no weight could be given to the first factor because it referred to processings of raw sugar from sugar cane, whereas the three largest Puerto Rican refiners dealt with raw sugar that had already been processed. This Court, in sustaining the allotment order, held that under the Act the Secretary could exclude quantitatively a factor which "has no significance" (p. 613). In other words, the Court held that a statutory factor which is not applicable to a particular case can be disregarded. Thus, if an air carrier transported only mail, and had no non-mail revenue, there would be no other revenue for the Board to offset. The *Roig* case does not hold—as petitioners would interpret it—that if the Puerto Rican refiners had processed raw sugar from sugar cane, the Secretary nonetheless could have excluded portions of such processings from the allotment formula.

In the *New York* case the Interstate Commerce Commission, pursuant to its power under Section 15 of the Interstate Commerce Act, 24 Stat. 384, 49 U. S. C. 15, to prescribe just and reasonable rates, had ordered nation-wide freight increases in order to remove discrimination. Section 15a (2) of the Act directs the Commission, in prescribing such rates, to "give due consideration," among other factors, to "the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such [adequate and efficient railway transportation] service." In upholding the order against an attack that the prior rates had not been, *inter alia*, noncompensatory, the Court held that the significance of the different factors in determining the reasonableness of rates was "for the Commission to determine" (331 U. S. at 349). But the *New York* case did not involve the subsidy need of a carrier, which is to be determined in relation to all of its other revenue. It involved the reasonableness of shipping rates fixed by the Commission to remove discrimination. The *New York* case affords no basis for the Board's claim that it can ignore substantial portions of a carrier's other revenue in determining subsidy need.

2. Petitioner Delta argues (Br. 19, 27), and petitioner Board (Br. 26, n. 17) and the *amici curiae* (Br. 11) suggest, that offsetting of C & S's excess domestic profits would constitute a recapture of earnings and revision of a closed rate which, under *Transcontinental and Western Air, Inc.* v. *Civil Aeronautics*

Board, 336 U. S. 601, is beyond the Board's power. We submit, however, that the *TWA* decision clearly is not applicable to the case at bar.

In the *TWA* case, the Board in 1945 had fixed a per ton mile *service* rate of 45 cents effective January 1, 1945.[33] On March 14, 1947, the carrier petitioned the Board to fix a higher rate for its domestic operations from January 1, 1946. *Pennsylvania-Central Airlines, Motions*, 8 C. A. B. 685, 686–687. The Board dismissed the petition insofar as it sought a retroactive increase for the period prior to filing the petition, on the ground that the Board had "no power to fix a new rate for an operation to apply to a period during which a final rate for that operation was in effect and not challenged by the initiation of a proceeding looking towards its revision." *Id.*, at 703. This Court upheld the Board's order.

As the Board concedes (Br. 26, n. 17), the only issue decided in the *TWA* case was whether Section 406 (a) of the Act, which authorizes the Board to make mail pay rates "effective from such date as it should determine to be proper," empowers it to make a new rate "retroactive for a period in which a final [service] rate previously fixed by the Board was in effect and unchallenged by the initiation of a mail

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[33] The Board simultaneously fixed the same service rate for the other "big four" domestic carriers. *Eastern Air Lines, Mail Rates*, 6 C. A. B. 551; *American Airlines, Mail Rates*, 6 C. A. B. 567; *United Air Lines, Mail Rates*, 6 C. A. B. 581.

rate proceeding" (336 U. S. at 602).[34] In answering that question in the negative,[35] the Court was not called upon to—and did not—decide any of the broader issues under Section 406 (b) which the case at bar presents. We do not believe the Court was purporting to determine in advance that, if the carrier ultimately should have excess earnings under a previously-fixed domestic subsidy rate, such excess could not be offset in determining the carrier's international subsidy need.[36] The two issues are

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[34] The only questions presented by petitioner in the *TWA* case related to the Board's *power* under Section 406 (a) to make the order retroactive. Petition for Writ of Certiorari, No. 387, October Term, 1948, pp. 5–6; Brief of Petitioner, *ibid.*, p. 3.

[35] The Court stated that Section 406 (a) was not intended to "mark a departure from the customary [public utility rate-making] pattern of fixing rates prospectively," but "only to make clear that the rates could be made retroactive to the date of the application" (p. 605).

[36] Although the Board stated in the *TWA* case that, because it considered TWA's domestic and international operations as separate units for rate-making, it would not set a system-wide rate for the carrier (8 C. A. B. at 702–703), that issue was not presented to this Court. Moreover, in so stating, the Board obviously was not purporting to decide how much subsidy TWA ultimately would need on its international operations. The carrier's domestic division had then become unprofitable, and soon thereafter was given a higher temporary rate. 9 C. A. B. 929 (May, 1948). Moreover, the Board's own precedents at that time indicated that excess profits on one division would be offset in awarding subsidy on another division. See *supra*, pp. 23–26, particularly the *Pan American* cases discussed at pp. 24-25.

separate and distinct, and the applicable policy considerations are different.

The Court's concern in the *TWA* case was that retroactive revision of closed service rates would place such rates on a "cost-plus" basis (pp. 606–607). In other words, even though a final service rate was fair when fixed, it would always be subject to retroactive increase if, for any reason,[37] the carrier's financial situation subsequently deteriorated. The issue in awarding subsidy, however, is not the fairness of compensation for carrying the mail, but the extent of the carrier's need. And since the need is that of the carrier as a whole, the carrier's total subsidy requirements for the period involved can be finally determined only when both domestic and international subsidy proceedings have been completed.[38]

Offsetting of excess profits which accrued under a closed domestic subsidy rate constitutes neither a "recapture" of such profits nor a "revision" of the domestic rate, cf. *Pan American Airways* v. *Civil*

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[37] TWA attributed its domestic financial difficulties primarily to the grounding of its Constellation aircraft and a pilots' strike. Transcript of Record, No. 387, October Term, 1948, p. 9.

[38] Petitioner Delta's contention (Br. 28–30) that offsetting excess domestic subsidy profits would result in a cost-plus system of rate-making overlooks the fact that subsidy for a past period always is fixed on that basis. For in such cases the Board awards subsidy which gives the carrier its costs (including taxes) plus a fair profit. By making the offset, the cost element is reduced.

Aeronautics Board, 171 F. 2d 139, 141 (C. A. D. C.).[39] The carrier retains every cent of subsidy which it has received on its domestic operations. Such offset merely reflects the fact that the Act limits a carrier's need to an amount which, "together with all other revenue of the air carrier," will enable the carrier to accomplish the national air transportation policy.

There is no issue here of the Board's power—or duty—to make up losses which may occur under a closed domestic subsidy rate in fixing international subsidy for the same period. Whether a carrier's over-all need is increased because domestic subsidy profits were less than anticipated depends upon many factors, including whether such lower domestic profits resulted from lack of economical and efficient management. But whether the Board might conclude that, under certain exceptional circumstances, a carrier needed additional subsidy on its foreign operations because of lower-than-estimated domestic subsidy profits, is not presented by these cases.

[39] In the *Pan American* case, Axis countries had been indebted to the carrier for carriage of mail, at the outbreak of the war, but such sums were uncollectible. In determining the carrier's net revenues for subsidy mail pay purposes, the Board excluded these sums, for which reserves had been set up on the carrier's books. However, the Board provided that, if and when they were collected, they were to be considered as income, and the Postmaster General was directed to offset them against amounts otherwise due the carrier. The Court of Appeals rejected the carrier's argument that this procedure constituted a "recapture" of its assets.

3. Finally, petitioners make a number of arguments in an attempt to show the allegedly harmful effects of compulsory offsetting upon the airline industry. Many of them deal with offsetting of excess non-subsidy earnings, a problem which may involve different policy considerations than does the instant case. In the first place, these arguments are all beside the point. As we have shown, Congress has already weighed the various economic arguments and has not allowed the Board any discretion to refuse to offset any portion of a carrier's other revenue, no matter for what reason. In any event, these arguments will not withstand analysis.

a. Petitioners contend (Board's Br. 28–29, Delta's Br. 34–36, *Amici's* Br. 25–26) that compulsory offsetting of excess domestic profits against need on international operations might result in withdrawal of the domestic carriers from the international field. They argue that domestic carriers with international divisions would be at an economic disadvantage in relation to their competitors who operate only domestically, since the latter could retain any excess earnings while the former would have such earnings "recaptured" to reduce foreign subsidy payments. Under such conditions, they suggest, the domestic carriers would have no incentive to conduct foreign operations, and would withdraw from, or decline to go into, the foreign field. Such a result, they contend, would contravene the Government's carefully determined national policy that American inter-

national air transportation should be conducted competitively by domestic carriers.

The possibility of such withdrawal from international operations is wholly conjectural, and without support in the record. In the case of carriers whose domestic operations are subsidized, the argument rather dubiously assumes that a carrier would refuse to conduct international operations, admittedly profitable, because its total subsidy is not permitted to exceed a fair over-all return. Further, it ignores the fact that the Board is bound to act promptly to reduce domestic subsidy payments which produce excess profits, so that any such profits would be of brief duration.

Nor can it be supposed that the Board would permit a carrier with unsubsidized domestic operations to earn an excessive rate of return for any extended period. The Board has plenary power under Section 1002 of the Act to reduce passenger fares and freight charges which yield more than a fair rate of return,[40] and presumably will exercise that power with dispatch whenever earnings become excessive.

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[40] Section 1002 (d) authorizes the Board whenever, upon complaint or upon its own motion, it determines that any existing rate, fare or charge, or the value of the service thereunder, is unjust and unreasonable, to prescribe a "lawful" rate, fare or charge. Fares and charges which produce an excessive return clearly are unjust and unreasonable. Section 1002 (e); Burt and Highsaw, *Regulation of Rates in Air Transportation*, 7 La. L. Rev. 1, 7–12.

The argument thus comes down to this: carriers are likely to give up a business in which, under the Board's current policy, the Government guarantees them ten percent after taxes. The reason for this abandonment will be solely because excess earnings on another portion of their business may be offset for that relatively brief period until the Board can take corrective action.[41] This is an argument which seems contrary to ordinary patterns of economic behavior, and seemingly contravenes the carriers' own long-term economic self-interest. In the absence of clear and convincing proof of its validity, it cannot be accepted. If the point ever is reached where compulsory offsetting threatens actual withdrawal of domestic carriers from the international field, there will be ample opportunity to seek remedial legislation.

b. Similarly without merit is the argument that domestic carriers with international operations would have no incentive to operate efficiently if their excess domestic earnings were to be offset. This argument overlooks the fact that the Act requires a subsidized carrier to have economical and efficient management. A carrier which fails to meet this standard is likely to have its subsidy reduced (see our discussion of this point in our brief in *Civil Aeronautics Board* v. *Summerfield*, Nos. 224 and 225, this Term, pp. 28–30). A

[41] As the Board recognizes (Br. 29), this would be a dubious basis for finding that abandonment of the international route would be in the public interest—a finding which Section 401 (k) requires as a condition to any abandonment of a route.

nonsubsidized carrier's incentive for efficiency is to insure that its income is sufficient to produce the maximum fair return. It may not be a simple matter for a carrier actually to earn eight percent under a domestic service rate, and this attempt may present greater problems to many carriers than the offsetting of earnings in excess thereof.

c. Nor is there substance to the contention that compulsory offsetting would injure the financial stability of the affected carriers, prevent them from obtaining more modern aircraft, and deprive the public of improved service which greater over-all funds would permit. The only earnings to be offset are those in excess of the carriers' needs, and the Board presumably gives sufficient subsidy to enable the carrier to satisfy those objectives.[42] The carriers have no valid claim to any more.

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[42] The Board suggests (Br. 26) that, because the domestic earnings of TWA, Braniff, Delta and Northwest "will be insufficient to support their international operations," these carriers (now on domestic service rates) will "soon" require subsidization of domestic operations. This argument loses sight of the fact that only excess earnings are to be offset. A carrier earning seven or eight percent obviously has no need for subsidy.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Chicago and Southern—Domestic Services

Reported	1948	1949	1950	1948–50 total
U. S. mail revenues received	[1] $1,891,989	[1] $1,800,384	[2] $1,747,319	$5,439,692
U. S. mail ton-miles of traffic	[3] 481,731	[3] 520,462	[4] 608,040	.....
U. S. mail revenues per ton-mile of U. S. mail	[1] $3.92	[1] $3.45	[2] $2.87	.....
COMPUTATIONS				
If a mail service ton-mile rate of	[5] .53	[5] .53	[5] .53	.....
were applied, the resulting mail revenues would be	255,317	275,845	322,261	853,423
Subsidy estimated by subtracting revenues computed on 53¢ ton-mile rate basis from mail revenues actually received	1,636,672	1,524,539	1,425,058	4,586,269

SOURCE

[1] C. A. B. Recurrent Reports of Financial Data, C. & S. (Domestic Services), 4th Quarter of 1949.

[2] C. A. B. Recurrent Reports of Financial Data, Domestic Air Mail Carriers, Trunk Lines, 12 months ended 12-31-50, p. 2 of 4.

[3] C. A. B. Recurrent Report of Mileage and Traffic Data, C. & S. (Domestic Services), 4th Quarter 1949.

[4] C. A. B. Recurrent Report of Mileage and Traffic Data, Domestic Air Mail Carriers, Trunk Lines, 12 months ended 12-31-50, p. 2 of 4.

[5] This 53¢ per ton mail rate was utilized by the Board in calculating C & S's subsidy in its Report on Administrative Separation of Subsidy from Total Mail Payments to Domestic Air Carriers, *supra*, note 9, and was applied by the Board in separating the carrier's service mail pay from subsidy. ***Chicago and Southern Airlines, Domestic Operations***, Docket No. 5144, Order No. E-5869, November 15, 1951. There the Board, in fixing prospective annual mail pay of $1,045,000, stated that $382,000 represented service mail pay at 53¢ per ton-mile "and the balance of $663,000 is subsidy." (*Id.* at mimeographed p. 7).

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